IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1189

MILDRED FRANCES ANDREW, ADMINISTRATRIX OF THE ESTATE OF EDWIN FRANKLIN JACKSON, CAPTAIN, DECEASED,

Petitioner,

vs

THE BENDIX CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Respondent agrees that the opinions, below, as appended to Petitioner's brief, are accurately reflected.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Respondent unequivocally challenges one word used by the Petitioner.

That word is "constitutionally".

At no time, and in no place in the proceedings in the lower courts was the word "constitutionally" ever used or injected as an issue in this case!

STATEMENT OF THE CASE

The last six lines of the third paragraph, page 3, of Petitioner's brief are misleading, and certain representations therein are without any foundation in fact.

The sentences and words referred to are these:

> "* * *. Petitioner decided to file the action in Ohio to facilitate discovery of her action. The unit which Petitioner claims was improperly produced was made in Cincinnati, Ohio, and as a consequence, most of the discovery work took place in the Cincinnati, Ohio area."

Of course, we cannot know the Petitioner's thought processes.

What we do know, is the facts, and they are these:

1. At one time Respondent did have a production unit in Ohio, known as "Bendix-Hamilton," Hamilton being a small town some 22 miles northwest of Cincinnati;

2. However, when Petitioner filed her action in Ohio in 1965, Respondent's "Bendix-Hamilton" production unit had been closed down and abandoned for over three years;

3. Moreover, she filed her action in Columbus, Ohio which is some 105 miles north and east of Cincinnati, Ohio;

4. Furthermore, Columbus is in the Eastern Division of the U. S. District Court for the Southern District of Ohio, whereas Cincinnati and Hamilton are both in the Western Division of Ohio which sits in Cincinnati; and

5. Finally, to the best of Respondent counsel's knowledge, *there was never any discovery of any kind in the Cincinnati, Ohio area.*

From these facts, one can only conclude that Petitioner's reasons for filing in Ohio were as specious as her representations concerning same.

ARGUMENT

I.

Respondent will first address itself to the challenge made to Petitioner's "Question Presented."

At the outset, it is perfectly clear that there is no issue to be joined as to whether the prohibition against an appellant injecting a constitutional question for the first time in a reviewing court is a matter of procedural or substantive law.

The end result is the same whether we follow the jurisdictional statute invoked by the Petitioner, Title 28, §1254, United States Code, which would be procedural in nature or the substantive law of Ohio.

The Court's attention is invited to F. C. A. Title 28, §1254 at page 194, annotation 17. There the general rule recognized and applied by this Court is stated:

> "Question not considered below would not be reviewed."

There is a plethora of citations of U. S. Supreme Court decisions to this effect. *New York Dock Co. v Poznan*, 274 U. S. 117 (1927); to *McCullough v Kammerer Corp.*, 326 U. S. 327 (1943).

The lack of later cases would indicate that the futility, of trying to inject a new issue in an appellate court, is so widely recognized that the bar no longer attempts it.

The general rule quoted above is enforced even more strongly where an attempt is made to inject a constitutional issue in a reviewing court. *16 Am. Jur. 2d* 304, et seq.

> "The Court will not rule on constitutional issues that are not precisely in issue" United States v Petrillo, 332 U. S. 1.

> "Constitutional questions will be dealt with only as they are 'appropriately raised upon a record before the court.' " Oil, C. & A. W. I. Union v Missouri, 361 US 363; Allen-Bradey Local v Wisconsin Employment Relations Bd. 315, U. S. 740.

As stated above, if this question of attempting to inject a new issue at the appellate level would be deemed to be governed by the substantive law of Ohio, the answer is identical.

It is succinctly stated by the Supreme Court of Ohio in *The Village of Clarington v Althar*, 122 O. S. 608, 974 NE 251. The entire opinion is as follows:

> "It is ordered and adjudged that said petition in error be, and the same is hereby dismissed on the ground that *'the constitutional question was not raised in either the trial court or the Court of Appeals and therefore the same is deemed waived.'* (Our emphasis)

This decision was announced in 1930; affirmed and reaffirmed in more than 20 later decisions; and as recently July 21, 1971 in *The State of Ohio v Phillips*, 27 OS 2d 294, 56 O.O. 2d 174, at page 178 we find:

> " 'It is an established rule of long standing in this state that a constitutional question, either in a civil or criminal action, cannot be raised in the Supreme court unless it was presented and urged in the courts below. Hoffman v. Staley, 92 Ohio St. 505, 112 N.E. 1084; Cuthbertson v. State, 106 Ohio St. 658, 140 N.E. 941; Zimmerman v. Morris Plan Bank of Cleveland, 113 Ohio St. 703, 150 N.E. 920; and Village of Clarington v. Althar, 122 Ohio St. 608, 174 N.E. 251.' State ex rel. King v. Shannon (1960), 170 Ohio St. 393, 394, 11 O.O. (2d) 121, 122."

The foregoing, whether considered under federal procedure or the substantive law of Ohio, should cause this honorable Court to deny the writ.

II.

Petitioner Does Not Qualify Under Rule 19 Guidelines.

The only section of U. S. Supreme Court rules under which Petitioner could qualify for the issuance of a writ of certiorari, is Rule 19 (b):

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; * * *".

In the instant case the absolute reverse of 19(b) is true. One has only to skim through Judge Peck's opinion (Petitioner's Appendix B) to find that all of the federal cases cited are in complete harmony with the 6th Circuit's decision in the case at bar. *Estate of Tuckman v. Estate of Cottle*, 175 F2d 775 (1949); *Riley v Union Pacific Railroad Co.*, 182 F2d 765 (1950); *Sigler v Youngblood Truck Lines*, 149 F. Supp. 61 (E.D. Tenn. 1957).

Other federal cases of identical import are found in *C & L Rural Electric Cooperative Corp. v Kincade*, 175 F. Supp. 223 (N.D. Miss. 1959); *Sorensen v Overland Corp.*, 142 F. Supp. 354, (C. D. Del. 1956); and *Scurlock Oil Co. v Three States Contracting Co.*, 272 F2d 169 (5th Cir. 1959).

All agreeing that any "savings statute" has application *only*, in the jurisdiction where the action was originally brought.

This aspect of Petitioner's posture, standing alone, should be sufficient to cause this honorable Court to deny the writ.

CONCLUSION

For the reasons stated above, Respondent says that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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